Mar 9 2000

(33)

No. 99-5525

Supreme Court, U.S.
FILED
MAR 9 - 2000
CLERK

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR THE COMMUNITY INTEREST; KLAASKIDS FOUNDATION; NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC.; PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, INC.; JUSTICE FOR ALL (TEXAS); JUSTICE FOR ALL (NEW YORK); AND ANTI-VIOLENCE PARTNERSHIP IN SUPPORT OF THE JUDGMENT BELOW

KRISTIN LINSLEY MYLES
KELLY M. KLAUS
AVITAL ZER-ILAN
MUNGER, TOLLES & OLSON LLP
33 New Montgomery Street
San Francisco, CA 94105
(415) 512-4000

DAVID CASTRO
General Counsel
Center for the Community Interest
114 East 32 Street, Suite 604
New York, NY 10016
(212) 689-6080

DANIEL P. COLLINS
Counsel of Record
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae CENTER FOR THE COMMUNITY INTEREST; KLAASKIDS FOUNDATION; NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC.; PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, INC.; JUSTICE FOR ALL (TEXAS); JUSTICE FOR ALL (NEW YORK); AND ANTI-VIOLENCE PARTNERSHIP

39pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

A. The Narrow Question Raised by This Case Is Whether Congress Has the Authority to Displace the Exclusionary Rule That This Court Has Applied to Admissions Obtained in Violation of the Nonconstitutional Prophylactic Rules Set Forth in *Miranda* v. *Arizona* 6

B. Congress Has the Authority to Preclude the Courts from Applying an Exclusionary Rule in the Absence of a Constitutional Violation 9

C. Any Perceived Constitutional Dimension to *Miranda*'s Overbroad Exclusionary Rule Should Be Rejected in Light of the Doubtful Validity of the Rule and Its Substantial and Unjustifiable Social Costs 11

1. The Constitutionally Problematic Nature of the Broad Exclusionary Rule Established in *Miranda* Sharply Undermines Any Perceived Claim to *Stare Decisis* .. 11

2. The Unjustified Societal Costs That Result From *Miranda*'s Exclusionary Rule Provide a Strong Additional Reason for Declining to Invoke *Stare Decisis* to Preserve any Perceived Constitutional Dimension to That Rule 17

TABLE OF CONTENTS
(Continued)

Page

3. The Other *Stare Decisis* Factors Weigh Heavily Against *Miranda*'s Exclusionary Rule 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Anders v. *California*,
386 U.S. 738 (1967) 15

Arizona v. *Roberson*,
486 U.S. 675 (1988) 8, 24

Bank of Nova Scotia v. *United States*,
487 U.S. 250 (1988) 5, 14, 16

Bram v. *United States*,
168 U.S. 532 (1897); 6

Brown v. *Mississippi*,
297 U.S. 278 (1936) 6, 7

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 12

Coleman v. *Thompson*,
501 U.S. 722 (1991) 4, 13

Davis v. *United States*,
512 U.S. 452 (1994) 8, 20

Edwards v. *Arizona*,
451 U.S. 477 (1981) 8, 24, 25

Harris v. *New York*,
401 U.S. 222 (1971) ..... *passim*

Haynes v. *Washington*,
373 U.S. 503 (1963) 6

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 12

TABLE OF AUTHORITIES

Page

Cases

McCleskey v. *Zant*,
499 U.S. 467 (1991) 27

McNeil v. *Wisconsin*,
501 U.S. 171 (1991) 8

Michigan v. *Mosley*,
423 U.S. 96 (1975) 8

Michigan v. *Tucker*,
417 U.S. 433 (1974) ..... *passim*

Miller v. *Fenton*,
474 U.S. 104 (1985) 7

Miranda v. *Arizona*,
384 U.S. 436 (1966) ..... *passim*

Molloy v. *Hogan*,
378 U.S. 1 (1964) 6

Mu'Min v. *Virginia*,
500 U.S. 415 (1991) 4, 15

Murray v. *United States*,
487 U.S. 533 (1988) 14

New York v. *Quarles*,
467 U.S. 649 (1984) ..... *passim*

Oregon v. *Elstad*,
470 U.S. 298 (1985) ..... *passim*

Pacific Mutual v. *Haslip*,
499 U.S. 1 (1991) 17

TABLE OF AUTHORITIES

Page

Cases

Payne v. *Tennessee*,
501 U.S. 808 (1991) 5, 17, 28

People v. *Braeseke*,
25 Cal. 3d 691, 602 P.2d 384 (1979),
vacated, 446 U.S. 932, *judgment reinstated*,
28 Cal. 3d 86, 618 P.2d 149 (1980),
cert. denied, 451 U.S. 1021 (1981) 26

Planned Parenthood of Southeastern Penn. v.
Casey, 505 U.S. 833 (1992); 17, 28, 29

Smith v. *Robbins*,
120 S. Ct. 746 (2000) 4, 15, 16

State v. *Hoeplinger*,
206 Conn. 278, 537 A.2d 1010 (1988) 25

State v. *Hoeplinger*,
27 Conn. App. 643, 609 A.2d 1015 (1992) 26

State v. *Oldham*,
618 S.W.2d 647 (Mo. 1981) 26

State v. *Rodriguez*,
186 Ariz. 240 (1996) 25

State v. *Rodriguez*,
192 Ariz. 58, 961 P.2d 1006 (1998) 25

Stewart Org. v. *Ricoh Corp.*,
487 U.S. 22 (1988) 10

United States v. *Carignan*,
342 U.S. 36 (1951) 6

United States v. *Title Insurance & Trust Co.*,
265 U.S. 472 (1924) 28

TABLE OF AUTHORITIES

Page

Cases

Vance v. *Terrazas*,
444 U.S. 252 (1980) 3, 9

Withrow v. *Williams*,
507 U.S. 680 (1993) 7

Wolman v. *Walter*,
433 U.S. 229 (1977) 17

Statutes and Rules

18 U.S.C. § 3501 ..... *passim*

Supreme Court Rule 37 1

Law Review Articles

P. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*,
90 NW. U.L. REV. 1084 (1996) 18, 19

P. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*,
20 HARV. J.L. & PUB. POLICY 327 (1997) 19

P. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*,
90 NW. U.L. REV. 387 (1996) 18, 19, 20, 21, 22

P. Cassell & R. Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*,
50 STAN. L. REV. 1181 (1998) 18

TABLE OF AUTHORITIES

Page

Law Review Articles

P. Cassell & R. Fowles, *Handcuffing the Cops?: A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*,
50 STAN. L. REV. 1055 (1998) 18

P. Cassell & B. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda,
43 U.C.L.A. L. REV. 839 (1996) 18, 22, 24

D. Collins, *Farewell* Miranda*?*,
1995 PUB. INT. L. REV. 185 22

J. Donohue, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) 19

L. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*,
48 CATH. U.L. REV. 727 (1999) 16

P. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 20

P. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*,
1987 U. Ill. L. Rev. 223 23

S. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500 (1996) 19, 23

S. Schulhofer, *Reconsidering* Miranda,
54 U. CHI. L. REV. 435 (1987) 13

C. Weisselberg, *Saving* Miranda,
84 CORNELL L. REV. 109 (1998) 16

TABLE OF AUTHORITIES

Page

Miscellaneous

Atkins & P. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*(1998) (available at <http://papers.ssrn.com/paper.taf?ABSTRACT_ID=140992>) 18

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1992 21

Dept. of Justice Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation, reprinted in* 22 U. MICH. J.L. REFORM 437 (1989) 27

F. FEENEY, ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY(1983) 20, 23

"No Verdict in Third Mutilation-Murder Trial," A.P. State & Local Wire (June 9, 1999) 25

STATISTICAL ABSTRACT OF THE UNITED STATES (1999) 21

Pursuant to this Court's Rule 37.3, *amici curiae* Center for the Community Interest; KlaasKids Foundation; National Organization of Parents of Murdered Children, Inc.; Parents of Murdered Children of New York State, Inc.; Justice For All (Texas); Justice for All (New York); and Anti-Violence Partnership respectfully submit this brief urging this Court to affirm the judgment of the United States Court of Appeals for the Fourth Circuit and to hold that 18 U.S.C. § 3501 prohibits a federal court from excluding a voluntary confession on the ground that it was taken in violation of the prophylactic warning requirements set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).[1]

INTEREST OF *AMICI CURIAE*

The Center for the Community Interest ("CCI") is a national non-profit public interest organization founded to provide a voice for localities and community groups on public safety and quality-of-life issues. CCI helps cities, states, and civic associations to develop and defend policies that strike a reasonable balance between the rights of the individual and the needs of the larger community, addressing issues such as school violence, injunctions to control gangs, drug-related crime in low-income housing, and restrictions on aggressive panhandling. CCI has developed a nationally recognized expertise on legal issues affecting the safety and quality of life of communities. CCI has participated in a wide range of public safety and quality-of-life cases before this Court and other courts throughout the country. In addition, it has represented crime victims' groups in helping to sustain "Megan's Law" in the Second Circuit and, in the Fifth Circuit, the right of crime victims

---

[1] This brief is filed with the consent of both petitioner and respondent, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

to communicate with parole boards. CCI is extremely concerned about the harms caused to crime victims and their families when criminals may escape justice because confessions that are constitutionally voluntary are excluded as a result of violations of the prophylactic rules of *Miranda* v. *Arizona*. CCI believes that the statute challenged here, 18 U.S.C. § 3501, would protect against these harms without disparaging Fifth Amendment rights.

CCI is joined by six other amici on the brief. The KlaasKids Foundation for Children is a national non-profit group that is in the forefront of advocating child safety through education and public awareness programs. Mr. Klaas founded the group after the murder of his 12-year-old daughter, Polly, by a parolee. The National Organization of Parents of Murdered Children, Inc. provides emotional support to families and friends of homicide victims. Its programs include Parole Block, which has successfully campaigned to keep convicted murderers behind bars. The Anti-Violence Partnership is a non-profit organization that addresses violence in Philadelphia through victim services, crime prevention, and programs such as Families of Murder Victims and the Student Anti-Violence Education Program. Justice for All of New York and of Texas are two separate non-profit organizations, each dedicated to the support and promotion of crime prevention and public safety bills and the broadening of legal rights for the victims of sexual and violent crimes. Parents of Murdered Children of New York State is a non-profit organization formed in 1983 by the parents of murder victims to protect the rights of victims of violent crimes. As advocates for the victims of violent crime, the six co-amici organizations share CCI's grave concerns about the implications of invalidating § 3501.

SUMMARY OF ARGUMENT

The parties' analysis of 18 U.S.C. § 3501 is based on a fundamental misreading of the statute. Because § 3501 does not contain any language that can be read to alter or

abolish *Miranda*'s prophylactic warning requirements, police officers must continue to abide by them. The statute merely alters the analysis that *courts* must apply *ex post*: A confession will be admissible if it is "voluntarily given." 18 U.S.C. § 3501(a). The statute prevents courts from applying the exclusionary rule unless an *actual* violation of the Constitution has occurred. Thus, the rule is eliminated *only* in those instances where the "*Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself." *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985).

It is one of "the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts," subject only to the constraints of the Constitution. *Vance* v. *Terrazas*, 444 U.S. 252, 265 (1980). As the Court of Appeals in this case correctly concluded, the issue is whether the breadth of the exclusionary rule set forth in *Miranda* "is required by the Constitution." J.A. 166. This Court's cases clearly establish that it is not. "The Fifth Amendment prohibits use by the prosecution in its case in chief *only* of *compelled* testimony." *Elstad*, 470 U.S. at 306-07 (first emphasis added). The *Miranda* exclusionary rule, however, unquestionably operates to bar statements that are not in fact compelled. Indeed, this Court has repeatedly drawn a sharp distinction between the ultimate constitutional standard—voluntariness—and the prophylactic rules of *Miranda*. *See Elstad*, 470 U.S. at 318; *New York* v. *Quarles*, 467 U.S. 649, 654 (1984); *Michigan* v. *Tucker*, 417 U.S. 433, 445-46 (1974); *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

The parties contend that *Miranda* rests on the sort of "constitutional basis" that precludes Congress from modifying it, and that principles of *stare decisis* dictate that this purported "constitutional" limitation should be preserved. U.S. Br. at 23; *see also* Petr. Br. at 22-27. The parties' position is itself at war with principles of *stare decisis*.

The straightforward constitutionalization of *Miranda* urged by Petitioner is flatly inconsistent with numerous

decisions of this Court, which have, for 30 years, unambiguously and emphatically rejected the view that *Miranda*'s prophylactic rules are required by the Constitution. *Elstad*; *Quarles; Tucker*; *Harris*. Similarly, *Miranda* cannot be recast merely as establishing a set of doctrinal presumptions that the Court applied in order to simplify the adjudication of Fifth Amendment issues; this view directly conflicts with this Court's longstanding limitations on the use of such presumptions, *Coleman* v. *Thompson*, 501 U.S. 722, 737 (1991), and *Miranda* simply cannot be understood as a jurisprudential labor-saving device. Nor can § 3501 be invalidated on the ground that *Miranda* should be viewed as reflecting a constitutional holding that *some* sort of prophylactic safeguards must be put in place at the police station house. U.S. Br. at 26-29. This argument addresses the wrong element of *Miranda*. There is no inconsistency between reaffirming that the warnings must still be given and upholding § 3501's mandate to federal courts to apply the drastic remedy of exclusion only when an actual violation of the Constitution has occurred. Moreover, there is simply no basis for concluding that an unyielding, inflexible exclusionary rule is an *indispensable* element of a constitutionally adequate prophylactic regime.

The Government contends that upholding § 3501 would be inconsistent with this Court's repeated application of the full measure of that rule in state cases. The Government is almost certainly correct that the Court's practice in state cases brings *Miranda* into conflict with this Court's repeated insistence that it lacks "supervisory authority" over state courts and cannot reverse state court judgments unless they actually conflict with the "commands of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991). The practice is also inconsistent with the Court's treatment of prophylactic rules in other contexts. *Smith* v. *Robbins*, 120 S. Ct. 746, 756-57 (2000). The tension between *Miranda*'s excessive exclusionary rule and the Court's abjuration of a supervisory power over state courts suggests that, in an appropriate state case, the Court

will need to resolve this tension either by eliminating the overbreadth of *Miranda*'s exclusionary rule in state cases or by adhering to its exercise of an apparent supervisory power in this one area of the law. But this case arises in federal court, and this Court has consistently held that its exercise of supervisory power may not be invoked to disregard the commands of a congressional statute. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988).

At a minimum, it is apparent that any conceivable reading of *Miranda* that would invalidate § 3501 would place that decision squarely in conflict with another line of this Court's jurisprudence. The Court thus cannot simply fall back on *stare decisis*, but must instead decide this case correctly on its own merits.

An additional important factor in determining whether to invoke *stare decisis* is whether the challenged rule has imposed significant harms that outweigh the perceived benefits. *Payne* v. *Tennessee*, 501 U.S. 808, 827-30 (1991). This additional factor weighs strongly in favor of upholding § 3501. One obvious cost of *Miranda*'s overbroad exclusionary rule is that, by excluding voluntary and reliable confessions, the rule unjustifiably increases the risks that criminals will not be punished. Even considering all of the limitations in the available empirical evidence, it is clear that *Miranda*'s overbroad rule excludes voluntary confessions in thousands of cases each year; that many of these cases are dismissed as a consequence; and that there are adverse effects on the disposition of many of the remaining cases. Numbers, however, do not tell the whole story. One must not lose sight of the fact that these "small" percentages conceal individual injustices. Because § 3501 requires exclusion of involuntary confessions, it does not result in the injustice of imprisoning the innocent. However, it is deeply offensive that, without sufficient reason, *Miranda*'s exclusionary rule permits the guilty to escape justice.

ARGUMENT

A. The Narrow Question Raised by This Case Is Whether Congress Has the Authority to Displace the Exclusionary Rule That This Court Has Applied to Admissions Obtained in Violation of the Nonconstitutional Prophylactic Rules Set Forth in *Miranda* v. *Arizona*

The Government's attack on § 3501 is premised on the view that the statute effects "a return to a totality-of-the-circumstances [voluntariness] test *in all settings*." U.S. Br. 36 (emphasis added). Petitioner's argument rests on the same assumption. Petr.'s Br. 28-29. This central premise of the parties, however, is based on a patent misreading of the statute. As set forth below, nothing in § 3501 purports to alter the prophylactic rules that this Court has imposed upon police officers to guard against violations of Fifth Amendment rights; the familiar *Miranda* warnings must still be given. Rather, the only effect of § 3501 is to prevent courts from applying the exclusionary rule unless an *actual* violation of the Constitution has occurred.

Prior to *Miranda*, this Court held that, in federal cases, both the Self-Incrimination Clause and the Due Process Clause of the Fifth Amendment prohibited the Government from admitting an involuntarily obtained confession into evidence against a criminal defendant for any purpose. *See Bram* v. *United States*, 168 U.S. 532, 543-44, 557-58 (1897) (applying Self-Incrimination Clause in federal case); *United States* v. *Carignan*, 342 U.S. 36, 38 (1951). Similarly, even prior to this Court's decision in *Molloy* v. *Hogan*, 378 U.S. 1 (1964)—which first recognized the applicability of the Self-Incrimination Clause in state cases—this Court had held that the Due Process Clause of the Fourteenth Amendment precluded the States from using coerced confessions in criminal cases. *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963); *Brown* v. *Mississippi*, 297 U.S. 278, 285-86 (1936). The Court's decision in *Molloy* "opened *Bram*'s doctrinal avenue for the analysis of state cases," and therefore, after

Molloy, the Self-Incrimination Clause would also apply to bar the admission of a coerced confession in a *state* case. *Withrow* v. *Williams*, 507 U.S. 680, 688-89 (1993). Thus, prior to *Miranda*, both the Self-Incrimination Clause and the Due Process Clauses established the same test for *admissibility of confessions in court*: A confession is admissible if, under all the circumstances, it is voluntarily given.

Before *Miranda*, however, the two Clauses did *not* both apply at the police station house. The Court had long held that the Due Process Clause is violated, not merely by the *admission* of a coerced statement into evidence, but also by the police's act of forcing the suspect to give the statement in the first place. *See Brown*, 297 U.S. at 286 (holding that the Due Process Clause prohibited the "methods . . . taken to procure the confessions"); *see also Miller* v. *Fenton*, 474 U.S. 104, 109 (1985). By contrast, prior to the decision in *Miranda*, this Court had never held that the *Self-Incrimination Clause* imposed any limits on the conduct of police interrogation itself. *See New York* v. *Quarles*, 467 U.S. 649, 654 (1984). *Miranda*'s central innovation was its establishment, under the aegis of the Self-Incrimination Clause, of a set of bright-line procedural rules for the conduct of interrogations by police officers at the station house.

In imposing these rules, *Miranda* sought to fashion a set of "safeguards" that would protect an in-custody suspect's Fifth Amendment right to remain silent. 384 U.S. at 467. In doing so, the *Miranda* Court was not content merely to rely upon the admonition that police officers should not "coerce" confessions: Although voluntariness was the ultimate constitutional touchstone, that standard—at least from the *ex ante* point of view of the officer in the station house—does not provide any clear, bright-line rules concerning the permissible limits of interrogation. *Withrow*, 507 U.S. at 694 ("*Miranda*'s 'core virtue' was 'afford[ing] police and courts clear guidance on *the manner in which to conduct a custodial investigation*'") (citations omitted) (emphasis added). In part because of that concern, the

Court set forth certain *per se* rules that—in the absence of an equally effective alternative set of procedural safeguards—"must be observed." 384 U.S. at 467.

Specifically, the Court held that, prior to custodial interrogation, a police officer must advise the suspect (1) "that he has the right to remain silent"; (2) "that anything said can and will be used against the individual in court"; (3) "that he has the right to consult with a lawyer and to have the lawyer with him during interrogation"; and (4) "that if he is indigent a lawyer will be appointed to represent him." *Miranda*, 384 U.S. at 468, 469, 471, 473. If the suspect clearly invokes his right to an attorney under *Miranda*, then (assuming no break in custody) he may not be approached for further questioning regarding any offense unless counsel is present. *McNeil* v. *Wisconsin*, 501 U.S. 171, 176-77 (1991); *Arizona* v. *Roberson*, 486 U.S. 675, 682 (1988); *Edwards* v. *Arizona*, 451 U.S. 477, 485 (1981). An equivocal request for counsel, however, does not trigger these additional requirements. *Davis* v. *United States*, 512 U.S. 452, 459-62 (1994). On the other hand, if the suspect does not request an attorney, but instead invokes his *Miranda* right to remain silent, the suspect may later be questioned about other offenses. *Roberson*, 486 U.S. at 683; *Michigan* v. *Mosley*, 423 U.S. 96, 103-06 (1975).

The Court in *Miranda* expressly acknowledged that these specific procedural "safeguards" were *not* required by the Constitution. 384 U.S. at 467. Nonetheless, the Court sought to enforce these safeguards by adopting an across-the-board exclusionary rule that bars, with limited exceptions, the admission of any statement taken in violation of those prophylactic rules. The result is that the "*Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985).

Viewed against this backdrop, the effect of § 3501 is clear from the language of the statute. First, because

§ 3501, by its plain terms, addresses only the subject of the admissibility of confessions *in court*, there simply is no basis for concluding that the statute alters the various requirements that *Miranda* and its progeny impose upon police officers who conduct custodial interrogations. Those obligations remain unaltered by the statute, and police officers must continue to abide by them. Second, although the statute does not alter the prophylactic rules established in *Miranda* to ensure, *ex ante*, against possible violations of the Fifth Amendment, the statute does alter the analysis that *courts* must apply *ex post*: Under the statute, a confession will be admissible if it is "voluntarily given." 18 U.S.C. § 3501(a). Thus, the effect of the statute is to eliminate the application of the exclusionary rule in those instances—and *only* those instances—where the *"Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself." *Elstad*, 470 U.S. at 306.

The issue raised by § 3501 is thus substantially narrower than suggested by the parties. The question whether the *Miranda* Court had the constitutional authority in the first instance to set forth specific guidelines governing police custodial interrogation is an important one, but that issue is not squarely presented by this case. Nothing in the statute purports to alter these requirements. Rather, the only question posed by § 3501 is the narrow one of whether Congress has the authority to limit the courts to applying an exclusionary rule only in those instances that involve an *actual* violation of the Fifth Amendment. As set forth below, Congress has that authority.

B. Congress Has the Authority to Preclude the Courts from Applying an Exclusionary Rule in the Absence of a Constitutional Violation

It is one of "the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts." *Vance* v. *Terrazas*, 444 U.S. 252, 265 (1980). Like any congressional power, it is subject to the constraints of the Constitution. But unless the rule estab-

lished by Congress is *forbidden* by the Constitution, the choice is Congress's to make. *Stewart Org.* v. *Ricoh Corp.*, 487 U.S. 22, 31-32 (1988). As the Court of Appeals in this case correctly concluded, the issue is thus whether the breadth of the exclusionary rule set forth in *Miranda* "is required by the Constitution." J.A. 166. This Court's cases clearly establish that the answer to this question is "No."

"The Fifth Amendment prohibits use by the prosecution in its case in chief *only* of *compelled* testimony." *Elstad*, 470 U.S. at 306-07 (first emphasis added). The *Miranda* exclusionary rule, however, unquestionably operates to bar statements that are not in fact compelled: As this Court has squarely held, the *Miranda* rule "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation." *Id.* at 306. Indeed, this Court has repeatedly drawn a sharp distinction between the ultimate constitutional standard—voluntariness—and the prophylactic rules of *Miranda*. Thus, for example, in recognizing a "public safety" exception to the *Miranda* warning requirements, this Court in *Quarles* specifically noted that there was "no claim that [Quarles's] statements were *actually compelled* by police conduct which overcame his will to resist." 467 U.S. at 654 (emphasis added). Similarly, in recognizing that statements taken in violation of *Miranda* may nonetheless be used for purposes of impeachment, this Court in *Harris* v. *New York*, 401 U.S. 222 (1971), was careful to note that Harris "makes no claim that the statements made to the police were coerced or involuntary." *Id.* at 224. In *Elstad*, the Court held that a "suspect who has once responded to unwarned yet *uncoercive* questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." 470 U.S. at 318 (emphasis added). *See also Michigan* v. *Tucker*, 417 U.S. 433, 445-46 (1974) ("[W]e have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in

Miranda to safeguard that privilege.").

As explained earlier, § 3501 alters the law only in those instances in which a confession is taken in violation of *Miranda*'s prophylactic rules but is nonetheless—as in *Elstad*, *Quarles*, *Tucker*, and *Harris*—not involuntary in the constitutional sense. Thus, the statute merely prohibits exclusion in precisely those instances in which no violation of the Constitution actually occurred. Because § 3501 does not purport to require the admission of any confession that the Constitution *requires* to be suppressed, it is constitutional. The court below correctly applied this reasoning in upholding the statute. *See* J.A. 207-11.

C. Any Perceived Constitutional Dimension to *Miranda*'s Overbroad Exclusionary Rule Should Be Rejected in Light of the Doubtful Validity of the Rule and Its Substantial and Unjustifiable Social Costs

1. The Constitutionally Problematic Nature of the Broad Exclusionary Rule Established in *Miranda* Sharply Undermines Any Perceived Claim to *Stare Decisis*

Despite this Court's repeated holdings that a violation of *Miranda* is not itself a violation of the Constitution, Petitioner and the Government both contend that *Miranda* rests on the sort of "constitutional basis" that precludes Congress from modifying it, and that principles of *stare decisis* dictate that this purported "constitutional" limitation should be preserved. U.S. Br. at 23; *see also* Petr. Br. at 22-27. Both parties are wrong. The central defect in the parties' arguments is that they fail to identify clearly the power that the *Miranda* Court purported to exercise; the parties largely assume that, whatever authority the Court was exercising, it was one that would trump any effort by Congress to modify *Miranda*'s exclusionary regime. Closer examination of the various possible bases for *Miranda* makes clear that the broad sweep of *Miranda*'s exclusionary

rule is not immune from the sort of limited congressional modification contained in § 3501. Indeed, the parties' contrary position is itself inconsistent with a substantial body of precedent in this Court.

Petitioner (but not the Government) urges the ambitious view that "*Miranda* represents the Court's interpretation of the Constitution" and that the rules set forth in *Miranda*, despite their "prophylactic" character, are therefore "constitutionally required." Petr. Br. at 25, 29. If the apparent premise of this argument were correct, § 3501 would indeed be unconstitutional: If the Court in *Miranda* had purported to define the substantive contours of what the Fifth Amendment actually requires, there would be no doubt that Congress would be powerless to modify *Miranda*'s exclusionary rule. *See City of Boerne* v. *Flores*, 521 U.S. 507, 519-20 (1997); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But Petitioner's premise is not correct. Despite some language in *Miranda* that might have supported this view, the Court has, for 30 years, unambiguously rejected the view that *Miranda*'s prophylactic rules represent the requirements of the Constitution itself. *Michigan* v. *Tucker*, 417 U.S. at 444 (*Miranda* rights are "not themselves rights protected by the Constitution"); *see also Elstad*, 470 U.S. at 306-08; *Quarles*, 467 U.S. at 654; *Harris*, 401 U.S. at 224-25. Accordingly, Petitioner's attempt to elevate *Miranda* to the status of an ordinary constitutional decision would, at this late date, require the overruling of *Harris*, *Tucker*, *Quarles*, and *Elstad*: Each of these decisions is premised critically on the view that the full breadth of *Miranda*'s exclusionary rule is *not* constitutionally required. The doctrine of *stare decisis* thus obviously cannot be invoked in support of Petitioner's straightforward constitutionalization of *Miranda*.

An alternative view would be to read *Miranda* as merely establishing a set of doctrinal presumptions that the Court applied in order to simplify the adjudication of Fifth Amendment issues. Although this position has been

endorsed in academic commentary, *see, e.g.*, S. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 448-52 (1987), neither Petitioner, the Government, nor their many *amici* unambiguously endorses this position. It is not difficult to see why. If *Miranda* were construed as merely establishing certain doctrinal aids to adjudication, it would come into direct conflict with this Court's longstanding limitations on the use of such presumptions. A conclusive presumption "is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases"; accordingly, a mandatory presumption should not be employed if "the generalization is incorrect as an empirical matter." *Coleman* v. *Thompson*, 501 U.S. 722, 737 (1991). There is no support whatsoever for the view that "almost all" un-*Mirandized* statements are actually involuntary; in fact, as this Court's own cases suggest, quite the opposite is true.

Moreover, whatever else may be said about *Miranda*, it simply cannot be understood as a jurisprudential labor-saving device. As this Court made clear in *Elstad*, the presumption of compulsion that arises from the failure to follow *Miranda* is irrebuttable *only* for purposes of the government's case-in-chief; a statement taken in violation of *Miranda* may be used for impeachment if it is voluntarily given. *Elstad*, 470 U.S. at 307-08. One must not lose sight of the fact that what occurs when a criminal defendant files a motion to suppress on *Miranda* grounds is that the district court ultimately makes *two* inquiries *in each and every case*: (1) the court must decide whether *Miranda* was violated, thereby requiring suppression in the government's case-in-chief, and (2) the court must also decide whether the statement may be used for impeachment by determining whether, under the traditional "totality of the circumstances" test, the statement is voluntary. So long as two different standards govern whether a statement may be used in the case-in-chief and whether it may be used for impeachment, the *Miranda* regime *doubles* the work that trial courts must do. *Miranda* thus could be justified as a

labor-saving device only if *Harris* were overruled—a result that would have catastrophic results for the integrity of the criminal justice system by distorting the truth-finding process in a manner that would be gravely unjust to victims of crime. Under § 3501, by contrast, trial courts need only make a single inquiry (and one that they already make anyway): whether the confession was voluntary.

A third approach, which is apparently the one advocated by the Government, would be to view *Miranda* as reflecting a constitutional holding that *some* sort of prophylactic safeguards must be put in place at the police station house in order to avoid violations of the Fifth Amendment. U.S. Br. at 26-29. There are several problems with this argument. For one thing, it addresses the wrong element of the *Miranda* regime. Nothing in § 3501 dispenses with the warning requirement or other prophylactic safeguards at all. The question whether the Court had the constitutional authority, in the first instance, to prescribe a framework of prophylactic rules for the conduct of police interrogation is a different question from whether the Constitution *requires* the exclusion of evidence taken in violation of those rules. It clearly does not, as this Court's own judicially created exceptions to *Miranda*'s exclusionary rule illustrate. Moreover, there is no basis for concluding that an unyielding, inflexible exclusionary rule is an *indispensable* element of a constitutionally adequate prophylactic regime. In virtually every other area of the law, suppression is not ordered when the harm to be avoided did not materialize: A patent Fourth Amendment violation, for example, will not result in suppression if the evidence would inevitably have been discovered. *Murray* v. *United States*, 487 U.S. 533, 539-40 (1988). Indeed, Congress has the power to require the courts to adhere to the principle of "harmless error," *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-55 (1988), and it is inconsistent with that principle to insist that *Miranda*'s prophylactic rules must be *over*enforced and that exclusion must be ordered even when the harm sought to be avoided did not occur.

The Government contends that upholding Congress's power to modify *Miranda*'s broad exclusionary rule would be inconsistent with this Court's repeated application of the full measure of that rule in state cases. This argument seeks to convert *Miranda*'s greatest weakness into its greatest strength. As the *Miranda* case law now stands, the Court unquestionably has exercised a power to reverse state court judgments even in the absence of an *actual* violation of the Constitution, and it has done so largely through the device of using the *Miranda* rules to "deem" there to have been a constitutional violation even when, applying *Harris*, the courts have properly determined that there wasn't one. The Government is almost certainly correct that this practice brings *Miranda* into conflict with this Court's repeated insistence that it lacks "supervisory authority" over state courts and cannot reverse state court judgments unless they actually conflict with the "*commands* of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991) (emphasis added).

The practice is also inconsistent with the Court's treatment of the prophylactic rules it has created in other contexts. For example, in *Smith* v. *Robbins*, 120 S. Ct. 746, 757 (2000), this Court recently addressed the "prophylactic framework" that was set forth in *Anders* v. *California*, 386 U.S. 738 (1967), for evaluating a request of appellate counsel to withdraw, or to dispense with merits briefs, on the grounds that an appeal would be frivolous. *Anders* held that, "in order to protect indigent defendants' constitutional right to appellate counsel, courts must safeguard against the risk of granting such requests in cases where the appeal is not actually frivolous." *Id.* at 752-53. In *Smith*, this Court ruled that the particular procedure set forth in *Anders* was not "obligatory upon the States" and that, in assessing whether a particular State's alternative procedure was sufficient, courts must "focus on the underlying goals that the procedure should serve." *Id.* at 756, 760. The uncritical and inflexible application of *Miranda*'s exclusionary rule in state cases is inconsistent with these

principles: By requiring suppression even in the absence of an actual violation of constitutional rights, *Miranda*'s unusual exclusionary rule goes well beyond the "underlying goals" that the decision seeks to serve and vastly exceeds "the minimum requirements of the Fourteenth Amendment" that constitute the sole limit to the "wide discretion" of the States. *Smith*, 120 S. Ct. at 757, 760.

The tension between *Miranda*'s excessive exclusionary rule and the Court's abjuration of a supervisory power over state courts suggests that, in an appropriate state case, the Court will need to resolve this tension either by eliminating the overbreadth of *Miranda*'s exclusionary rule in state cases or by adhering to its exercise of an apparent supervisory power in this one area of the law. But this case arises in federal court, and that makes it much easier to resolve. Even if the extreme breadth of *Miranda*'s exclusionary rule is conceded to rest, in part, on an exercise of supervisory authority, that raises less difficulty, because this Court *has* supervisory power in federal cases. However, that recognition is fatal to the Government's position, because this Court has consistently held that supervisory power may not be invoked to disregard the commands of a congressional statute. *Bank of Nova Scotia*, 487 U.S. at 254.

At a minimum, it is apparent that any conceivable reading of *Miranda* that would invalidate § 3501 would place *Miranda* squarely in conflict with another line of this Court's jurisprudence. Several of *Miranda*'s defenders have candidly conceded this point, and—in contrast to the evasiveness of the Government here—have forthrightly called for a "reconstitutionalization" of *Miranda* and the limiting or overruling of *Harris*, *Tucker*, *Quarles*, and *Elstad*. *See, e.g.*, C. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998); L. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U.L. REV. 727 (1999). Because the constitutional legitimacy of *Miranda*'s overbroad exclusionary rule is a matter on which, at best, this Court's decisions are in tension with one another,

the Court cannot simply fall back on *stare decisis*, but must instead decide this case correctly on its own merits. *Planned Parenthood of Southeastern Penn.* v. *Casey*, 505 U.S. 833 (1992) (Opin. of O'Connor, Kennedy, & Souter, JJ.) (rejecting the trimester framework of *Roe* v. *Wade*, 410 U.S. 113 (1973), because that aspect of the decision was in tension with other aspects of *Roe* and with other abortion cases); *Pacific Mutual* v. *Haslip*, 499 U.S. 1, 37-38 (1991) (Scalia, J., concurring) ("Our holdings remain in conflict, no matter which course I take."); *Wolman* v. *Walter*, 433 U.S. 229, 266 n.2 (1977) (Stevens, J., concurring in part and dissenting in part) ("In view of the acknowledged tension [between two decisions] the doctrine of *stare decisis* cannot foreclose an eventual choice between two inconsistent precedents."). The correct decision, as stated earlier, is to uphold § 3501.

2. The Unjustified Societal Costs That Result From *Miranda*'s Exclusionary Rule Provide a Strong Additional Reason for Declining to Invoke *Stare Decisis* to Preserve any Perceived Constitutional Dimension to That Rule

The inherently unsettled status of *Miranda*'s exclusionary rule is not the only reason for concluding that *stare decisis* provides no obstacle to Congress's limited modification of that rule in § 3501. Assuming that *stare decisis* has some perceived force here, an additional important factor is whether the challenged rule has imposed significant harms that outweigh the perceived benefits of the decision. *Payne* v. *Tennessee*, 501 U.S. 808, 827-30 (1991). This consideration has special force here, because this Court has emphasized that the scope of *Miranda*'s exclusionary rule must be drawn in a manner that takes account of its substantial costs. *Elstad*, 470 U.S. at 312. This additional factor weighs very strongly against invalidating § 3501.

There is a substantial body of evidence that strongly suggests that *Miranda* has imposed certain heavy costs on the criminal justice system and the Nation as a whole. In

particular, Professor Cassell has analyzed the available data, conducted his own independent research, and concluded that the *Miranda* regime has reduced the rate at which suspects confess and has resulted in a substantial increase in the number of unsolved crimes. *See* P. Cassell & R. Fowles, *Handcuffing the Cops?: A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1059 (1998) ("[C]rime clearance rates fell precipitously immediately after *Miranda* and have remained at lower levels ever since."); P. Cassell & R. Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998); P. Cassell & B. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 U.C.L.A. L. REV. 839, 842 (1996) (reporting conclusions of study in Salt Lake City) ("The 33% confession rate we found is lower than the rates reported in studies done before *Miranda* and conducted in countries that do not follow the *Miranda* requirements, suggesting that *Miranda* has reduced the confession rate."); P. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387, 391 (1996) ("[The evidence] suggests that each year *Miranda* results in 'lost cases' against roughly 28,000 serious violent offenders and 79,000 property offenders and produces plea bargains to reduced charges in almost the same number of cases."); P. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U.L. REV. 1084, 1085 (1996) ("*Miranda* causes the loss of roughly 3.8% of all criminal cases each year and about an equal number of more lenient plea bargains . . . ."); *cf.* R. Atkins & P. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule* 22 (1998) (available at <http://papers.ssrn.com/paper.taf?ABSTRACT_ID=140992>) ("[T]he Supreme Court may have increased total crime

rates by 11% with its *Miranda* ruling.").[2]

Most of these studies have attributed the harms caused by *Miranda* to the warning requirement itself, rather than to the exclusionary rule. *See, e.g.*, Cassell, *supra*, 90 NW. U. L. REV. at 392-94. The Government seizes upon this fact to argue that, unless § 3501 is construed to eliminate the warning requirement, the statute cannot ameliorate the adverse effects of the decision. U.S. Br. at 32 n.23. The Government's position overlooks a second harm from the *Miranda* regime, apart from the reduced ability of police to obtain confessions in the first place. Specifically, *Miranda*'s overbroad exclusionary rule unjustifiably increases the risks that criminals will escape justice. As Justice White

---

[2] Because *Miranda* has been the law of the land in all 50 States since 1966, it simply has not been possible to perform a rigorous statistical comparison using an American control group in which *Miranda* does not apply; the points of comparison must necessarily be with foreign jurisdictions or with American jurisdictions in an earlier day and age. Some defenders of *Miranda* have been quick to use this fact to take issue with certain of Professor Cassell's methods and conclusions. *See, e.g.*, S. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500, 502 (1996). Professor Cassell's extensive rejoinder to Professor Schulhofer's article concludes that "Schulhofer indulges every presumption against harm from *Miranda*" and applies a "one-sided methodology." Cassell, *supra*, 90 NW. U.L. REV. at 1086. Prof. Cassell has also noted that one of the principal studies upon which Prof. Schulhofer relies has since been shown to have been deeply flawed in its data collection. P. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POLICY 327, 330-32 (1997). Moreover, the view that *Miranda*'s costs have been dissipated by police resourcefulness in adapting to the decision, Schulhofer, *supra*, 90 NW. U.L. REV. at 507-10, is fallacious: It would be akin to saying that, if firefighters get very good at fighting blazes, fire should be deemed to cause only "vanishingly small" costs, and we should not be concerned about deliberately setting them. *Cf.* J. Donohue, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1150-51 (1998) (noting that this argument "implies that the real cost of *Miranda* likely is a resource cost"; if the greater efforts needed to solve crimes under *Miranda* were on the order of $4 billion, "then *Miranda* annually costs $4 billion," even if crime rates do not increase).

observed in his *Miranda* dissent, "[i]n some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." 384 U.S. at 542 (White, J., dissenting); *see also Davis*, 512 U.S. at 465 (Scalia, J., concurring) (noting that *Miranda*'s exclusionary rule may have produced "the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens").

The academic commentary, even from *Miranda*'s detractors, has been largely dismissive of this concern, concluding that the release of criminals due to a *Miranda*-based suppression order is "quite rare." P. Cassell, *supra*, 90 NW. U. L. REV. at 392. The prevailing dismissive view is based on studies which indicate that the rate at which prosecutions fail because of *Miranda*'s suppression rule is probably not greater than about 0.3% of cases. *See id.* at 392 & n.17 (data from study of San Diego and Jacksonville arrests for burglary and robbery indicate that at most 0.3% of cases "could be said to have been dropped because of *Miranda* problems with the confession") (citing F. FEENEY, ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 144 (1983)). The Feeney study on which this number is based included, not just cases in which motions to suppress were filed, but also cases in which the prosecution dropped the case without the need for a formal motion. *Id.*[3] For several reasons, these studies do not show that *Miranda*'s exclusionary rule is "cost free."

Even assuming that the numbers calculated in these

[3] That perhaps explains why the dismissal rate found in this study is almost four times higher than the dismissal rate in a study that focused only on cases in which formal motions were actually filed. *See* P. Cassell, *supra*, 90 NW. U. L. REV. at 392 (citing P. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 601 (concluding that suppression orders led to dismissals in 0.071% of cases)).

studies are accurate, the relatively small percentage numbers conceal a significant amount of crime. If one extrapolates these rates across the entire criminal justice system, the numbers are substantial. There were 259,500 arrests for burglary in the United States in 1997, and even if only 0.3% of those cases were dropped because of *Miranda*'s exclusionary rule, that would still amount to almost 779 cases per year. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 222 (1999). If the same 0.3% rate applies for more serious crimes such as aggravated assault, robbery, or murder, that would translate into more than 1500 violent-crime cases that would have been dropped *in a single year* because of the *Miranda* decision (1210 assault cases, 356 robbery cases, and 42 murder cases). *Id.*[4] Indeed, about 15% of prosecutor's offices in any given year report experiencing dismissals of cases based on *Miranda* problems. *See* Cassell, *supra*, 90 NW. U.L. REV. at 393 & n.18 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1992, at 6 (1993)). Thus, the supposedly "small" percentage of *Miranda*-based dismissals suggests that there are thousands of victims of crime who are denied justice each year in the United States because of *Miranda*'s overbroad exclusionary rule. The point can be vividly made by considering another seemingly "small" percentage: Approximately 0.3% of all Americans died of heart disease in 1997, *see* STATISTICAL ABSTRACT OF THE UNITED STATES 99 (1999), but this "small" percentage could hardly be thought to establish that *that* problem is insignificant.

Moreover, the small percentages reflected in the above-cited studies are misleading because they are based upon

[4] The actual impact of *Miranda*, of course, would be expected to differ from crime to crime; some may have a rate higher than 0.3%, and some may have less. The police and prosecution, for example, may be more willing to drop a burglary case with a tainted confession than a murder case. In such cases, the full costs of *Miranda*'s exclusionary rule include, not just dropped cases, but the additional expenditure of resources.

all cases, without regard to whether a confession was even obtained. In evaluating the efficacy of a rule, however, it makes sense to focus one's attention on the cases in which the rule is actually called into play. Stating that *Miranda* affects only 0.3% of *all* cases is a little like saying that smoke alarms "affect" only a tiny percentage of *all* homes on any given day (including those that don't experience a fire that day). Rather, the question is whether *Miranda* affects the outcome of those cases in which it is applied, *i.e.*, *those cases in which confessions are challenged*. That percentage is necessarily higher, and the effects of *Miranda* in such cases are unquestionably significant.

The available empirical evidence confirms what is obvious to anyone who has worked in the criminal justice system: The vast majority of *Miranda* suppression orders involve statements that are "voluntary" under a traditional Fifth Amendment/Due Process analysis. *See, e.g.*, Cassell, *supra*, 90 Nw. U.L. Rev. at 393 n.24 (summarizing evidence and concluding that "generally coerced confessions are quite rare"). That was certainly the experience of the undersigned counsel of record, who has previously noted, based on his service as an Assistant United States Attorney, that a judicial finding of involuntariness is "very rare." D. Collins, *Farewell* Miranda*?*, 1995 PUB. INT. L. REV. 185, 193 n.19 (reviewing J. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993)). Thus, the shift from a "voluntariness" exclusionary rule to *Miranda*'s exclusionary rule is *the* single determining factor in the significant majority of cases in which such suppression motions are granted.

Moreover, the statistical studies that have been conducted indicate that motions to suppress confessions are filed in approximately 1% to 6.6% of cases and are granted in anywhere from 2% to 50% of those cases, depending upon the jurisdiction and the time period studied. *See* P. Cassell & B. Hayman, *supra*, 43 U.C.L.A. L. REV. at 890 & n.243 (collecting studies). Although the resulting percentage of *all cases* in which *Miranda*'s exclusionary rule eliminates

a confession is less than 1%, the range of numbers found in these studies suggest that that rule has certainly had a significant impact on the disposition of suppression motions in particular jurisdictions. The remarkable suppression rate of *50%* found in one study indicates a very substantial impact in some places. *Id.* (citing FEENEY, *supra*, at 144).

Additionally, *Miranda*'s exclusionary rule undoubtedly has adverse effects beyond the complete dismissal of certain cases. Even if most of the cases in which suppression motions are granted are not ultimately dismissed, the exclusion of such highly probative evidence undoubtedly increases the likelihood of a disposition that is more favorable to the defendant—whether by acquittal or by a plea bargain on more favorable terms. One study, for example, found that the granting of a motion to suppress a confession had the effect of reducing the conviction rate in one jurisdiction from 94.1% to 66.7% (although the raw numbers in the study were apparently too small to permit a finding of statistical significance). *See* P. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. Ill. L. Rev. 223, 233 (Table 8).

Accordingly, even taking into account all of the limitations in the available evidence, it is clear that *Miranda*'s exclusionary rule operates to exclude voluntary confessions in thousands of cases each year; that many of these cases are dismissed as a consequence; and that there are adverse effects on the disposition of many of the remaining cases. Numbers, however, do not tell the whole story. One must not lose sight of the fact that these "small" percentages conceal individual injustices. Even some of *Miranda*'s staunchest defenders concede that "the release of only one guilty murderer or rapist is one too many. A single case of that sort must be counted as a substantial social cost, if the rules requiring that disposition are unjustified and if the harm they cause is avoidable." Schulhofer, *supra*, 90 NW. U.L. REV. at 502. Thus, even if the impact of *Miranda*'s exclusionary rule were only felt in a small number of cases,

the sometimes grave individual injustices created by the mindless inflexibility of that overbroad rule are intolerable. It is one thing for the courts to set a possibly guilty person free so that the *constitutional* right against compulsory self-incrimination is not violated; the Constitution expresses our Nation's belief that the unreliability and cruelty of coerced confessions have no place in our system. But it is quite another for the courts—in the name of a "prophylactic" rule—to systematically release guilty persons who have voluntarily given reliable confessions and whose constitutional rights have not been violated at all. Adherence to such a rigid exclusionary rule simply cannot be justified on the ground that it is required by the Constitution. *See Roberson*, 486 U.S. at 688 (Kennedy, J., dissenting) ("[T]he rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion.").

Undoubtedly many examples can be given of the injustices wrought by *Miranda*'s exclusionary rule, but a few will suffice to bring home the point that the effect of the rule is ultimately borne by crime *victims*. The persons harmed by *Miranda*'s inflexible rule include the victims of the various crimes that go unpunished as a result; the victims who must suffer through retrials after *Miranda*-based reversals; the victims who see lighter sentences meted out because the case had to be "plea-bargained" due to a *Miranda*-based confession problem; and, significantly, the victims of future crimes committed by recidivist beneficiaries of *Miranda*.[5]

One of the many casualties of *Miranda*'s harsh rule of exclusion is found in the State of Arizona's effort to convict the murderer of Dawn Dearing, a Tucson woman savagely

[5] Studies have consistently shown that arrestees with prior felony records are somewhat more likely to invoke their rights under *Miranda* than are those who lack a criminal record. P. Cassell & B. Hayman, *supra*, 43 U.C.L.A. L. REV. at 895-96. It is reasonable to conclude, therefore, that a disproportionate number of cases in which suppression is ordered under *Miranda* involve recidivists and career criminals.

beaten, sexually assaulted, and eventually murdered in her apartment. Among other atrocities committed on Ms. Dearing, a hot curling iron and the handle from a knife were found forced into her vagina. Tucson police received a tip pointing to Toribio Rodriguez, a former neighbor of Ms. Dearing's. While attempting to obtain fingerprint and blood samples pursuant to a court order, the police started to question Rodriguez; he made several incriminating statements, and he was arrested, tried, and ultimately convicted for Ms. Dearing's murder. The Arizona Supreme Court, however, determined that Rodriguez had been in custody when the police questioned him and therefore voided his conviction and sentence. *State v. Rodriguez*, 186 Ariz. 240, 245-47 (1996). By invoking *Miranda* as its sole ground for setting aside this initial conviction—the other nine points raised by Rodriguez were expressly rejected—the Arizona Supreme Court set in motion a series of retrials that have dragged on for several years.[6]

As noted earlier, the costs of *Miranda*'s exclusionary rule consist not only of those cases in which defendants escape justice altogether, but also of those in which the State and the victim or the victim's family must endure the burden of unnecessary retrials. A good example of the latter is the State of Connecticut's efforts to convict John Hoeplinger for the bludgeoning and strangulation of his wife in 1982. At his first trial, Hoeplinger was convicted of first degree manslaughter, but the conviction was reversed by the Connecticut Supreme Court on *Miranda* grounds. *State* v. *Hoeplinger*, 206 Conn. 278, 537 A.2d 1010 (1988). His second trial, at which he was again convicted, "lasted

[6] Rodriguez was tried and convicted a second time in 1996, but that conviction was reversed based on an instructional error related to the alibi defense he sought to present at that trial. *State* v. *Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998). A third trial last year resulted in a hung jury, and the State has announced its intention to retry Rodriguez a fourth time. *See* "No Verdict in Third Mutilation-Murder Trial," A.P. State & Local Wire (June 9, 1999) (available on LEXIS).

more than four weeks," involved "[m]ore than 250 exhibits," and required lengthy and extensive testimony by numerous expert witnesses "regarding sophisticated forensic analyses, including blood spatter analysis" and other expert testimony. *State* v. *Hoeplinger*, 27 Conn. App. 643, 644, 609 A.2d 1015, 1016 (1992).

Another troubling case involves Missouri's prosecution of Roy Oldham. While on probation for the molestation of one child, Oldham was picked up on suspicion of molesting a second child. The Missouri Supreme Court, laboring under the compulsion of *Miranda*'s categorical rule of exclusion, overturned Oldham's conviction for the second molestation because Oldham had said he wanted to talk to the lawyer who represented him on the first charge. *State* v. *Oldham*, 618 S.W.2d 647, 648-49 (Mo. 1981).

And there is also the case of Barry Braeseke, who confessed to firing multiple rifle shots into his mother, father, and grandfather, because he wanted to clear the way to his inheritance. During questioning at the station house, Braeseke indicated he wanted to talk to a lawyer. Officers stopped questioning Braeseke and took him to be booked. When asked to identify his next of kin, Braeseke asked an officer if he could speak "off the record." Braeseke proceeded to ask a series of "hypothetical" questions about what would happen if he confessed to the killings. The officer told him he would appreciate any information the Braeseke might provide but that it would be better for the statement to be recorded. Braeseke decided to give the police a recorded statement. At the beginning of the tape, he said he was testifying of his free will and that he did not want to have a lawyer present. He then confessed to the killings. The California Supreme Court, however, held the officers had violated Braeseke's rights under *Miranda* by interviewing him. *People v. Braeseke*, 25 Cal. 3d 691, 602 P.2d 384 (1979), *vacated*, 446 U.S. 932, *judgment reinstated*, 28 Cal. 3d 86, 618 P.2d 149 (1980), *cert. denied*, 451 U.S. 1021 (1981).

Of course, the cases reported in published appellate reports are just the tip of an iceberg. Far more frequently, guilty individuals are never held accountable for their crimes, either because prosecutors, knowing that *Miranda* will bar introduction of the most relevant piece of testimony (and often their only evidence directly linking the suspect to the crime), decline to bring charges in the first place; or because judges, constrained by the exclusionary rule, throw the case out at the pretrial stage.

A horrific example of the latter situation involves the 1984 murder of Denise Hubbard Sanders. Ms. Sanders was shot in the head at point-blank range by Ronnie Gaspard, a member of the "Bandidos" motorcycle gang in Fort Worth, Texas. Gaspard confessed to having pulled the trigger in the execution-style killing because Ms. Sanders had been courageous enough to testify in an earlier case to the gang's drug-trafficking activity. Because Gaspard had the fortuity of having a lawyer assigned to him when he entered the jailhouse—and notwithstanding Gaspard's subsequent waiver of his right to see a lawyer—a judge felt compelled by *Edwards* to strike the confession. Gaspard was reported to have walked out of the courtroom that day with a "big smirky grin" on his face. Dept. of Justice Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation*, *reprinted in* 22 U. MICH. J.L. REFORM 437, 571-72 (1989).

These real-life cases vividly demonstrate the drastic consequences of *Miranda*'s *per se* rule of exclusion. The draconian impact of *Miranda*'s exclusionary rule strikes at the heart of a sovereign society's unquestioned right "to articulate societal norms through criminal law[.]" *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991).

3. The Other *Stare Decisis* Factors Weigh Heavily Against *Miranda*'s Exclusionary Rule

The Government and Petitioner also invoke *stare decisis* on the ground that *Miranda*'s sweeping exclusionary rule

has engendered reliance and has proven to be workable. Petr.'s Br. at 31-34; U.S. Br. at 31-38. None of these contentions has merit.

This Court has observed on numerous occasions that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Payne* v. *Tennessee*, 501 U.S. at 828 (internal citations omitted); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924). In this case, the Government and Petitioner argue that a generation or more has grown accustomed to the *Miranda* regime and that disturbing any part of that regime would greatly harm society. The parties, however, focus on the wrong argument: Because § 3501 does not set aside the warning requirement, any reliance interests in *that* requirement are irrelevant.[7] The parties have failed to explain what kind of "harm" society would in fact experience from application of the exclusionary rule only in those instances where a constitutional violation actually occurred. The fact that a generation has become familiar with the *Miranda* warnings simply does not mean that individuals have actually relied on the *exclusionary* rule in ordering their lives. *See Casey*, 505 U.S. at 855 ("The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application.").

The parties and their *amici* also labor mightily to shoehorn this case into the extremely small category of "watershed decision[s]," which they contend should not be reexamined absent "the most compelling reason." *See*

[7] In any event, the asserted reliance interests are overblown. Reliance presumes knowledge, and it therefore makes no sense to speak of a suspect "relying" on being *told* his or her rights. There is also, of course, the reliance of screenwriters who would have to make the inevitable changes to television and movie scripts if the warnings were modified, but that interest seems entitled to little weight.

Petr.'s Br. at 44-45; U.S. Br. at 49-50. This rhetoric is misplaced here because, as already noted, this case does not require the Court to reconsider the authority for announcing the *Miranda* warnings or even to reconsider the warnings themselves. Rather, this case concerns only the scope of *Miranda*'s exclusionary rule—a rule this Court already has revisited and cabined numerous times. *See Harris*; *Tucker*; *Quarles*; *Elstad*. The Court's own precedents therefore belie the parties' claim that *Miranda*'s exclusionary rule enjoys a heightened immunity from reconsideration.

More fundamentally, the parties' effort to analogize this case to this Court's decision in *Casey* founders on its own terms. The *Casey* Court itself recognized only two decisions from the last half-century as falling into the class of "watershed decision[s]" that it suggested might require "the most compelling reason" for reexamination—and *Miranda* was not one of them. *See Casey*, 505 U.S. at 867 ("The Court is not asked to [issue such a decision] very often, having thus addressed the Nation *only twice* in our lifetime, in the decisions of *Brown* [*v. Board of Educ.*, 347 U.S. 483 (1954)], and *Roe* [*v. Wade*, 410 U.S. 113 (1973)]") (emphasis added). *Miranda*'s absence from this list can hardly be considered inadvertent. Indeed, the comparison to *Casey* fails on its own terms: Whatever the initial opposition to *Miranda* in 1966, it most assuredly is *not* true that, since then, "pressure to overrule the decision, like pressure to retain it, has grown only more intense." *Id.* at 869. Indeed, the not-so-benign neglect of 18 U.S.C. § 3501 by the Department of Justice makes clear how little institutional pressure has been placed on this Court on this issue. The parties' reliance on *stare decisis* rings hollow.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Dated: March 9, 2000

Respectfully submitted,

KRISTIN LINSLEY MYLES
KELLY M. KLAUS
AVITAL T. ZER-ILAN
MUNGER, TOLLES & OLSON LLP
33 New Montgomery Street
San Francisco, CA 94105
(415) 512-4000

Of Counsel:
David Castro
General Counsel
Center for the Community Interest
114 East 32 Street, Suite 604
New York, NY 10016
(212) 689-6080

DANIEL P. COLLINS
Counsel of Record
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae